

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Regarding: Charles O. Townley
Serial No. 10/758,455
Filing Date 01/15/2004
Docket No. THUMB-604DIV
For MODULAR BASAL THUMB JOINT IMPLANT

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SEP 15 2008

Petition to Instruct Examiner to
Withdraw a Prospective Objection

Attention: Supervisor Group Art Unit 3738

Commissioner for Patents, Alexandria, VA 22313-1450:

I certify that this correspondence is facsimile-transmitted
to the Patent and Trademark Office (571 273 8300) on 15 SEP 2008:

Christopher John Rudy: Christopher John Rudy 9/15/2008.

Please instruct Examiner Brian E. Pellegrino to withdraw the
decision to prospectively object to allowable claim 27 as being a
substantial duplicate of allowed claim 38 as set forth on page 6
of the 08/02/2007 Office action, which remains respectfully
traversed. Reconsideration was requested in the Request for
Reconsideration of Prospective Objection filed on Feb. 8, 2008.

In the 09/09/2008 Office communication with its Advisory
Action After the Filing of an Appeal Brief, the Examiner refused
to enter the request, reasoning that it was an affidavit or other
evidence related to appeal. It is not. It is in the form of a
request with argument in support of withdrawal of an objection.

On the merits, as submitted in the request, the subject
matter of claim 27 is not a substantial duplicate of claim 38.
Thus, among other things, through its dependence on claims 22 and
21, claim 27 requires, "[S]aid articulating surface defines a
truncated ball of a shape that is from substantially
hemispherical to greater than substantially hemispherical." See,
lines 9-11 of claim 27. Claim 38, on the other hand, requires,
"[S]aid articulating surface defines a truncated ball of a shape
that is greater than hemispherical." See, lines 8-9 of claim 38.
In other words, claim 27 includes a substantially hemispherical
articulating surface, but claim 38 requires an articulating
surface that is greater than hemispherical. And so, with respect
to these claim limitations as concerns their stated articulating
surfaces, claim 27 is in substance more broad than claim 38.

The Examiner has not contested such argument on the merits.

Respectfully,

Christopher John Rudy

Christopher John Rudy
USPTO Reg. No. 31,873
209 Huron Avenue, Suite 8
Port Huron, Michigan 48060
Telephone (810) 982-4221

Dated: September 15, 2008 A.D.